



EMPLOYMENT TRIBUNALS

Claimants: Mr M Foster and Mrs A Foster
Respondent: Minotaur Construction Ltd (In Liquidation)
Heard at: Nottingham
On: Tuesday 20 November 2018
Before: Employment Judge Brewer (sitting alone)

Representation

Claimants: Both Claimants in person
Respondent: No attendance

JUDGMENT

1. The claim by Mr Foster for unfair dismissal succeeds.
2. The claim by Mrs Foster for unfair dismissal succeeds.
3. Mr Foster is awarded a basic award in the sum of £3,093.53.
4. Mrs Foster is awarded a basic award in the sum of £3,093.53 and compensation of £21,999.84.

REASONS

Introduction

1. The Claimants in this case attended the hearing representing themselves. Before the hearing, it was established that the Respondent had been put into Creditors' Voluntary Liquidation and that they would not be attending the hearing and would not be sending any representation.
2. The Claimants gave oral evidence under oath and I took account of a number of documents. I found both of the Claimants to be credible witnesses. Their evidence was consistent with the paperwork I saw.

Claims

3. Both of the Claimants claim constructive unfair dismissal.

Issues

4. The issues in both cases are as follows:
 - 4.1 Did the Respondent breach an express or implied term or terms of the Claimants' contracts of employment, if so;
 - (a) was any such breach or were any such breaches "fundamental", if so;
 - (i) did either or both of the Claimants resign in consequence of the breach or breaches, and
 - (ii) did either or both of the Claimants act in a way which either waived the breach or breaches or affirmed the contracts.
 - 4.2 If the claims succeed, what compensation should be awarded?

The law

5. It is not necessary to set out any significant law in this case, which is relatively simple on its facts. The key point is that if there is a breach of contract in either case, that must be a breach to a fundamental term or a term which goes to the root of the employment relationship.
6. It should also be noted that the breach does not have to be the sole cause of the resignation, it merely has to be a cause of it.
7. The leading case is ***Western Excavating (ECC) Ltd v Sharpe [1978] ICR 221, Court of Appeal.***
8. It should be noted that a constructive dismissal is not necessarily unfair (***Savoia v Chiltern Herb Farms Ltd [1982] IRLR 166***). However, in this case, no potentially fair reason for dismissal has been pleaded.
9. In relation to whether a breach of contract is fundamental, in the context of this case, I note that a breach of the implied term of trust confidence is inevitably fundamental (see ***Morrow v Safeway Stores plc [2002] IRLR 9***).
10. In the case of a last straw dismissal, that is a course of conduct which cumulatively amounts to a fundamental breach of contract, I note that the last straw does not have to amount to a breach of contract but it cannot be innocuous (see for example ***Lewis v Motorworld Garages Ltd [1986] ICR 157, Omilaju v Waltham Forest London Borough Council [2005] ICR 481 and JV Strong & Co Ltd v Hamill [EAT 1179/99]***).
11. I also note that in relation to employees who remain in employment for some time after the breach, a failure to elect to treat the contract as repudiated does not waive the breaches and subsequent events may effectively resuscitate prior breaches (see ***Lochuack v London Borough of Sutton [EAT 0197/14]***).

Facts

12. I make the following findings of fact.
13. Mr Foster was employed by the Respondent from 2009. He was a Director owning 25% of the shares. He was engaged in what I might describe as operational development, that is to say taking land and seeing a project through to at least planning permission stage. The Managing Director of the Company and owner of the remaining shares is Mr Glyn Jones. The role Mr Jones played was to obtain clients who Mr Foster would then work with to develop their land.
14. Mr Foster was paid £916.66 per calendar month. As a shareholder, he also received dividends each month.
15. Until some time in 2017, the Respondent appeared to be doing well. However, somewhat unexpectedly, Mr Foster was told that he would not be paid after May. I find as a fact that Mr Foster was paid for the month of May but he was not paid thereafter.
16. In the period after May, the Respondent did a number of things to or in relation to Mr Foster. These were:
 - 16.1 prevented Mr Foster from accessing his work emails;
 - 16.2 granting Mr Jones' assistant access to Mr Foster's work emails;
 - 16.3 preventing Mr Foster from using what was in effect the Company credit card;
 - 16.4 diverting calls to Mr Foster's work mobile so that they were in future received by Mr Jones;
 - 16.5 sending a Mr Shaw to Mr Foster's home, where he maintained an office, to take away work files;
 - 16.6 removing Mr Foster as a Director of the Company in July 2017;
 - 16.7 sending Mr Foster his P45 with a termination date of 31 May 2017;
 - 16.8 accused Mr Foster of hacking the Respondent's computer system, and
 - 16.9 demanding that Mr Foster returned the "Company car" even though that car had been transferred into Mr Foster's ownership in 2014. It should be noted that Mr Foster has been told that his car had been reported as stolen, which plainly not the case.
17. As a result of the above, Mr Foster took legal advice and on 21 September 2017 solicitors acting for Mr Foster wrote to the Respondent accepting the breach of contract. Following the case of ***Société Générale, London Branch v Geys [2012] UKSC 63*** in which it was held that a wrongful repudiation does not automatically terminate a contract of employment, rather the contract ends when the other party, in this case Mr Foster, elected to accept the repudiation and in my judgement, Mr Foster elected to accept the repudiation by sending a letter which would have been received in the normal course of post by the Respondent on 22 September 2017, which I therefore find is the effective date of termination in this case.
18. In relation to Mrs Foster, she was also employed from 2009 by the Respondent. She acted as in effect Mr Foster's Executive Assistant.

19. Mrs Foster suffers from cluster migraines and has to work from home. The couple maintain an office at their home with two desks, two computers and other equipment necessary to run an office efficiently and effectively.
20. Mrs Foster was also paid £916.66 per month. However, she was not a shareholder of the business and did not receive any dividends.
21. Neither Claimants had written contracts of employment.
22. Mrs Foster continued to be employed by the Company until she too resigned by the solicitors' letter of 21 September 2017, referred to above, and I also find for the same reasons that the effective date of termination of her employment was 22 September 2017.
23. Mrs Foster resigned because of the continued failure on the part of the Respondent to pay her.
24. I note that an issue raised in the Response is whether Mr Foster was an employee. For the reasons set out below, I find that she was.

Discussion

25. Turning first to the question of Mrs Foster's employment status, her evidence which I accept was that she worked regularly from 2009, she was paid every month by the Respondent, she received payslips, she from time to time did extra work, for example if she was asked to do a particular mailshot by Mr Jones she did so. Throughout her employment with the Respondent, she had not worked for anyone else and there was no suggestion that she could.
26. Both Mr and Mrs Foster purchased their own equipment for their home office but consumables (that is to say things such as printer ink and paper) were paid for by the Respondent. Furthermore, if there were any IT issues, the Respondent's contracted IT provider accessed the computers in Mr and Mrs Foster's home office and fixed the problem.
27. It seems to me that there was clearly mutuality of obligation as between Mrs Foster and the Respondent, she personally provided services, that is to say the services of an Executive Assistant, to a Director of the Respondent and therefore to the Respondent for which she received pay. The Respondent deducted PAYE and national insurance contributions. Taken together, the totality of the relationship seems to me to be clearly one of employment and Mrs Foster was clearly an employee for the purposes of section 230(1) Employment Rights Act 1996, applying the well-known law as set out in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433*** and the many subsequent cases which have considered this issue.
28. For the reasons set out above, I have found that the effective date of termination of employment of both Claimants was 22 September 2017.

29. The failure to pay both Claimants was in and of itself a fundamental breach of contract. In the case of Mr Foster even if that was not the case, which it clearly is, the findings of fact I have made above about actions taken by the Company after May 2017 clearly amount to a series of acts which were calculated or likely to destroy the implied term of trust and confidence, the Respondent not having argued that they did what they did through any proper or reasonable cause.
30. In the case of Mrs Foster, again the failure to pay her the salary due amounted to a fundamental breach of contract upon which she was entitled to act by resigning.
31. In the absence of any justification for its actions and given that there is no pleaded potentially fair reason for dismissal, I have no hesitation in finding both dismissals unfair given all of the circumstances of the case.

Remedy

32. Dealing first with Mr Foster, although his total income each month was a global sum of around £2,500, only £916.66 is employment income. The balance is made up of dividends which he received as a shareholder and which I find do not form part of his contract of employment.
33. Mr Foster told me that he had made efforts to mitigate his loss and largely these have been successful. During June and July 2017, he undertook some consultancy work and earned £1,500 per month. From August to December 2017, that rose to £2,500 per month. Between January and June 2018, his consultancy work was £1,200 per month. He had no earnings between July and October 2018 but from November 2018 Mr Foster has been earning £1,000 per week doing consultancy work. Therefore, he has fully mitigated his loss.
34. Mr Foster is entitled to a basic award. Given his age at the effective date of termination, his 9 years' continuous service and weekly earnings of £229.15, he is entitled to a basic award of £3,093.53.
35. In relation to Mrs Foster, she is entitled to the same basic award as Mr Foster given her age, length of service and weekly pay, that is the sum of £3,093.53.
36. However, unlike Mr Foster, Mrs Foster given her need to work from home has not been able to mitigate her loss and I find that she has acted reasonably in all of the circumstances. I have therefore considered it unlikely she will mitigate. In the circumstances I award her the maximum I am able to which is 12 months loss, which at £916.66 per month (accounting for no pay rises) gives a compensatory award of £10,999.92 net.
37. No recoupment provisions apply.

Employment Judge Brewer
Date: 15 January 2019

JUDGMENT SENT TO THE PARTIES ON

.....
.....

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.